

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

December 6, 2006 Session

TERESA LOUISE EDGEMON v. LARRY LEE EDGEMON

Appeal from the Circuit Court for McMinn County

No. 25,391 John B. Hagler, Judge

No. E2006-00358-COA-R3-CV - FILED APRIL 26, 2007

In this divorce case, the trial court declared Teresa Louise Edgemon (“Wife”) and Larry Lee Edgemon (“Husband”) divorced, divided their marital estate, and awarded Wife a judgment against Husband for \$19,085.29. Husband appeals, raising several issues with respect to the trial court’s monetary award to Wife and the court’s division of the marital property. He also raises an evidentiary issue. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Michael P. McGovern, Knoxville, Tennessee, for the appellant, Larry Lee Edgemon.

Donald B. Reid, Athens, Tennessee, for the appellee, Teresa Louise Edgemon.

OPINION

I.

The parties were married on September 1, 2000. At the time, Husband was 52 and Wife was 44. One month prior to their marriage, Wife retired from her employment with the Social Security Administration. Following this, she worked for a temporary employment service. Approximately one year after the marriage, Wife secured a permanent position at a company called Holston Gas. Husband was employed by a manufacturing company, Bowater, Inc., during the majority of the marriage. He retired in 2004.

On August 31, 2000 – which, as can be seen, was one day before the marriage – the parties executed a prenuptial agreement before a notary public. Wife obtained the form contract off the Internet. The one-page agreement provides, in pertinent part, that

[a]ll property which belongs to each of the [] parties shall be, and shall forever remain, their personal estate, including all interest, rents, and profits which may accrue from said property, and said property shall remain forever free of claim by the other. The parties further acknowledge that they had disclosed to the other the nature, location and value of all property owned by them, wherever the same may be located, and that this disclosure was full and informative as to the title status and value of all property, whether real, personal or mixed. *Each parties' property subject to this agreement are listed on Exhibit[] No. 1 and Exhibit No. 2 to this agreement.*

(Numbering in original omitted; emphasis added).

October 14, 2003, was a significant date in this marriage. On that day, Husband, without Wife's consent or knowledge, purchased a new Ford pickup truck for \$25,130.05. He wrote a check on the parties' joint account for the full purchase price. The parties separated later that day when Wife discovered the purchase. On October 21, 2003, Wife filed for divorce. Husband counterclaimed, also seeking a divorce. Each sought an equitable division of their marital estate.

At a divorce hearing in December 2005, Wife produced the parties' one-page prenuptial agreement along with two one-page documents. The first of these two documents is entitled "Exhibit 1 (Pre-nup disclosure for [Wife])." It lists 12 items of separate property for Wife. As particularly pertinent to this appeal, number 2 on the list states, "Savings Acct at 1st Natl Bank, Athens TN (Plaza Branch) \$17,757.29." Wife testified that the funds in this account came from a divorce settlement and gifts from her mother. Wife's list also includes a 1996 Oldsmobile Cutlass Supreme, a thrift savings account valued at \$18,000, and several pieces of jewelry.

The second document is entitled "Exhibit 2 (Pre-nup disclosure for [Husband])," and lists 16 items of separate property for him. His list includes, among other things, a residence, a 401(k) account with a balance of more than \$100,000, a checking account at Bowater Credit Union with a balance of \$8,773, and a savings account at Bowater Credit Union with a balance of \$383. Both documents are in Wife's handwriting. As produced at the hearing, the two documents were attached to what is admittedly the parties' one-page prenuptial agreement.

Shortly after the parties married, they opened a joint bank account at Bowater Credit Union. During their marriage, they deposited their salaries in this account. Bank records establish that Husband closed his premarital bank accounts on November 30, 2000, and transferred the funds, which totaled \$9,307.40, to the parties' joint account. Wife testified that she also eventually transferred the funds in her premarital bank account at First National Bank to the same account. She stated that, in May 2001, she deposited \$13,000 that had previously been in her premarital account. Bank records pertaining to the joint account support this testimony. Wife also testified that she transferred \$7,000 to the joint account when she closed out her separate account. The bank records

reflect that a deposit of \$7,000 was made to the joint account. In April 2000, Wife began depositing her monthly retirement check of \$1,200 into the joint account.

Wife asked the court to award her a judgment against Husband for the \$17,757.29, which was, in her words, “protected by the prenuptial agreement,” one-half of the money that was in the parties’ joint bank account at the time of their separation, a 2003 Nissan Altima purchased by the parties during the marriage, and several other specific items of marital property. Husband requested that the court enforce the prenuptial agreement “as to him,” but he testified that the two documents attached to the agreement, *i.e.*, the purported handwritten lists of the parties’ respective separate property interests were not the exhibits that were a part of their prenuptial agreement when he signed it. Husband did not provide the court with a different version of the exhibits nor did he attempt to testify as to the differences between the “real” exhibits and the two documents offered by Wife.

Husband acknowledged that he signed the first page of the prenuptial agreement and that the parties had discussed “keeping separate property.” He stated that he was specifically concerned about protecting his residence.

After hearing the parties’ testimony, the court granted them a divorce on stipulated grounds and made the following findings with respect to their marital property:

I think the premarital agreement hits it pretty close, and I know these figures may not be exactly right, but it says she had \$17,757. She paid \$20,000 in, so she had something like that, and that deserves to be paid back to her. It’s not going to matter a great deal in this case if she had more than that or whatever because we’re going to try to let you-all each go back as much as possible to where you were, is about what it comes down to. So I certainly think she is entitled to [the \$17,757.29]. She is entitled to half of what was left in the [parties’ joint] account, [] \$1,328. I know that she made some deposits there at the end that would indicate that she had some funds, but I think that’s kind of covered by what she put in there at the [beginning]. . . .

They each had a car when they came into the marriage, going out they each have a better car. Both of them probably deserve that, [Husband] a little more than [Wife], based on his income.

I don’t think [Wife is] entitled to any appreciation with respect to his property[, on which the parties resided during their marriage,] because there’s really no proof of appreciation of the residence itself as opposed to the land, but some of those contributions to that property undoubtedly came from her, and [Husband] is going to reap the benefit from that.

* * *

With respect to the personal property, I think the safest way to get at the values and what that property means to each party is just to take th[e] list [provided in the parties' joint financial statement], include the television that should have been included on the list, flip a coin, let one go first and just start choosing those items as they're listed on the list. That will be the best indication of what's important to each side, and let's divide those that way.

The court's subsequent decree incorporated these findings and decreed that Wife was entitled to a judgment against Husband in the amount of \$19,085.29. This award to Wife accounts for the \$17,757.29 found in her list of separate property and one-half of what the trial court determined to be the balance of the parties' joint bank account. Husband appeals, asserting that the trial court erred (1) in determining that Wife was entitled to a judgment against him for \$17,757.29 and (2) in its division of the parties' marital property.

II.

In this non-jury case, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). Our review of questions of law is *de novo* with no presumption of correctness attaching to the trial court's conclusions. **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996). In applying our standard of review, we are mindful of the well-established principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. **Massengale v. Massengale**, 915 S.W.2d 818, 819 (Tenn. Ct. App. 1995).

III.

A.

To support his argument that the trial court should not have awarded Wife a judgment for \$17,757.29, Husband asserts that the court erred in considering, and relying upon, the prenuptial agreement offered by Wife at trial. He first contends that the three-page collective document should not have been considered because it was not properly received into evidence. He seems to contend this, even though he acknowledges that the first page signed by him is the authentic prenuptial agreement. Specifically, he asserts that the court should not have considered the agreement because it was only marked for identification and never "officially" introduced into evidence.

A commentator has suggested the following procedure for the admission of tangible items of evidence:

An attorney who wants to introduce an exhibit at trial should (a) ask the court reporter or other court officer to mark the exhibit for identification . . . ; (b) show the exhibit to adversary counsel (this should be reflected in the record), thereby giving him the opportunity to raise objections before foundation questions and answers suggest inadmissible matter; (c) either obtain the court's permission to approach the witness to deliver the exhibit for his inspection or, if required by court rule, ask that a court official present the exhibit to the witness; (d) lay the proper foundation for the admission of the exhibit, including proof of authenticity . . . ; and (e) then request that the exhibit be introduced into evidence.

Lawrence A. Pivnick, *Tennessee Circuit Court Practice* § 24-12, at 703-04 (4th ed. 1995). We agree that this is the formal procedure for the introduction of exhibits.

At the beginning of the hearing in this case, the following discussion took place between the trial judge and the parties' attorneys:

Wife's counsel: . . . The other document that I think the Court needs to have before it starts is the premarital agreement.

(To [Husband's counsel]) Do you have any objections to introducing that?

Husband's counsel: Your Honor, we have an objection that will be addressed at the appropriate time concerning the two [exhibits to the agreement]. We have no objection to the first page.

The Court: Why don't we do this: Let's just mark it for identification. . . . [The prenuptial agreement and its two exhibits, *i.e.*, the two handwritten lists enumerating the parties' separate property] will be [Trial] Exhibit 2 for identification, which may or may not become a full exhibit. We'll just see.

During direct examination, Wife identified Trial Exhibit 2 as the prenuptial agreement, with exhibits, executed by the parties on the day before their marriage. Wife's counsel then requested that Trial Exhibit 2 "be introduced as a full exhibit." The record does not reflect an objection by Husband's counsel nor does it reflect a response by the trial court to Wife's request. Immediately thereafter, Wife's counsel began to question Wife about the items listed in the two exhibits to the agreement. The court reporter then asked whether the prenuptial agreement had been "marked." The trial judge stated, "It's for identification." Either Wife or Wife's counsel then replied, "Still for identification?" The judge responded, "Still identification." The transcript reflects that, at this point in time, a

discussion occurred off the record. This Court is not privy to the contents of this discussion. The exhibit sticker located on Trial Exhibit 2 reads “ID only.”

Under the circumstances of this case, we find no error in the trial court’s consideration of the prenuptial agreement produced at trial. First, both parties testified with respect to certain aspects of the prenuptial agreement and to certain items of separate property as listed in the two exhibits identified by Wife. Additionally, Wife’s counsel requested that the agreement and its attachments be introduced into evidence as a “full exhibit” without response from opposing counsel or the court. Husband’s counsel had previously noted that he would object to the exhibits tendered by Wife at “the appropriate time,” but such an objection never was made. Thus, even if we assume the trial court erred in failing to specifically address Wife’s request to introduce Trial Exhibit 2 into evidence when that request was made, Husband’s failure to raise an objection following that request, and his failure, at a later time, to point out that the court was considering or had considered an exhibit never formally received into evidence, constitutes a waiver of that error as far as this appeal is concerned. *See* Tenn. R. App. P. 36(a) (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error *or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.*”) (emphasis added). It is clear from the record that the trial court ultimately considered the three-page collective document as evidence. It is also clear that Husband, while contending that the two exhibits proffered by Wife were not the true exhibits, never stated a reason why Wife was not entitled to the admission into evidence of the three-page collective exhibit. On the record before us, it is clear that the whole document was admissible because a witness, *i.e.*, Wife, identified the three-page document as the authentic document. It was for the trial court to determine the weight to be given to the subject exhibit. It obviously found the two exhibits to be authentic. We find no error.

B.

As an additional argument in support of his contention that the trial court erred in considering the prenuptial agreement, Husband argues that the preponderance of the evidence supports a finding that the agreement was entered into without prior adequate disclosure of Wife’s premarital assets. Specifically, he asserts that he was not made aware of Wife’s premarital account at First National Bank.

To be enforceable, a prenuptial agreement must have been entered into “freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse.” T.C.A. § 36-3-501 (2005). The “knowledge” component of the statute has been interpreted by the Supreme Court to require the party seeking to enforce the agreement to prove, by a preponderance of the evidence, that a full and fair disclosure of the nature, extent, and value of his or her holdings was furnished to the other party, or that such disclosure was unnecessary because the other party had independent knowledge of the same. *Randolph v. Randolph*, 937 S.W.2d 815, 817 (Tenn. 1996).

The prenuptial agreement with exhibits and the testimony supports a finding that Husband received a full and fair disclosure of Wife's account at First National Bank. The bank name, the bank's branch location, and the account balance of \$17,757.29 are clearly listed in the first exhibit to the agreement. To support the claim that he was not made aware of the First National Bank account, Husband again asserts his contention that the exhibits produced at trial are "different" from the original exhibits.

The trial court was faced with diametrically opposed testimony on the issue of the authenticity of the handwritten exhibits to the agreement. Wife testified that the agreement and exhibits presented to the court were, "[a]s far as [she could] tell," the same documents present the day that the agreement was signed. Husband testified that he believed the exhibits proffered by Wife were "different" from those present when the agreement was signed. However, Husband did not produce competing exhibits. Furthermore, he did not, in any way, discuss how the exhibits offered by Wife were different from the real ones.

Although the trial court did not explicitly state that it believed Wife's testimony over Husband's testimony with respect to the authenticity of the exhibits, it is clear to us, in light of the court's acceptance of the \$17,757.29 figure found in the list of Wife's separate property offered by her, that the court found Wife to be the more credible witness on this issue. This was a credibility call on the part of the trial court and certainly within the court's discretionary authority. *See Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn. Ct. App. 1991). Not having seen the parties testify in person, we are not in a position to say that the trial court was wrong in its assessment of credibility. With this credibility determination in mind, we find that the evidence does not preponderate against a finding that the exhibits offered at trial were the same exhibits present when the prenuptial agreement was signed. Consequently, the evidence supports a finding that Wife made a full and fair disclosure of her premarital assets, including the account at First National Bank.

IV.

Husband next attacks the trial court's award to Wife of a judgment against him for \$17,757.29 by arguing that the court erred in concluding that the preponderance of the evidence supports a finding that Wife even had a premarital bank account. To support this argument, Husband cites the "untrustworth[iness]" of (1) Wife's testimony and (2) the handwritten exhibits to the agreement that Wife presented at trial.

Wife testified that she had an account at First National Bank prior to the parties' marriage. She testified that the money in the account came from a divorce settlement and gifts from her mother. Both parties acknowledged that, early in their marriage, Wife made a \$13,000 and a \$7,000 deposit to the parties' joint bank account. Wife testified that this \$20,000 came from her premarital bank account. Husband was not asked to comment on where Wife got this \$20,000. Furthermore, and significantly, Husband never testified that he was unaware of the First National Bank account. His only mention of the account came after he was asked if Wife had cosmetic surgery during the marriage. Husband responded to the question in the affirmative and, interestingly enough, stated that

Wife closed the First National Bank account after she took the remaining balance in the account to pay for a portion of the cosmetic surgery. This testimony by Husband actually supports a finding that Wife had a premarital account at First National Bank. Thus, we cannot conclude, as suggested by Husband, that the preponderance of the evidence supports a finding that Wife did not have a premarital account at First National Bank.

V.

Husband further contends that the trial court erred in its distribution of the parties' marital estate. Specifically, he asserts that the court erred (1) in not accounting for certain marital assets that Wife possessed at the time of the divorce hearing; and (2) in valuing the parties' joint bank account at a date near the parties' separation, rather than at a date near the parties' divorce hearing.

In an action for divorce, the trial court is charged with the task of making an equitable division of the marital property without regard to fault. T.C.A. § 36-4-121(a)(1) (2005). The trial court has broad discretion in fashioning its division of the marital property. *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983). The court is under no obligation to divide the parties' marital estate equally, but rather equitably, for "[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal, or because each party did not receive a share of every item of marital property." *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (citations omitted).

In dividing marital property, courts are required to allocate interests in a manner consistent with the relevant statutory factors set forth in T.C.A. § 36-4-121(c).¹ *Brown v. Brown*, 913 S.W.2d 163, 168 (Tenn. Ct. App. 1994). An equitable property division “is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the unique facts of the case.” *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988). “In cases involving a marriage of relatively short duration, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position they would have been in had the marriage never taken place.” *Id.* (citation omitted). These parties were together for three years. This was a short marriage. Hence, the *Batson* principle applies to the facts of this case.

¹ T.C.A. § 36-4-121(c) provides as follows:

In making equitable division of marital property, the court shall consider all relevant factors including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Husband first argues that the trial court erred in its division of the parties' marital property by failing to take into account a \$4,334 balance in a BB&T bank account that Wife opened just prior to the parties' separation, a \$2,300 balance in a second Bowater bank account that Wife opened after the parties' separation, and \$2,000 that Wife spent in prepaying for her "room and board." The evidence supports a finding that Wife spent this money and/or had possession and control of this money at the time of the divorce hearing. Husband asserts that the trial court should have deducted the sum of these amounts – *i.e.*, \$8,634 – from the judgment it awarded to Wife against him. This argument misses the mark.

It is clear to us that the trial court considered the two bank accounts in question. The court specifically acknowledged "that [Wife] made some deposits there at the end that would indicate that she had some funds." The trial court reasoned that Wife was entitled to keep this money in light of the fact that she had contributed \$20,000 at the beginning of the marriage and was only receiving a return of \$17,757.29. We find no error in the trial court's rationale. Furthermore, though not specifically addressed by the trial court, we do not find that Wife's prepaying of \$2,000 in rent renders the court's division of the marital estate inequitable.

Husband's second argument with respect to the court's division of the marital property centers around the time at which the court valued the parties' joint bank account. Husband claims that the court erred, as a matter of law, in valuing the account near the parties' separation, rather than near the date of the parties divorce. *See* T.C.A. § 36-4-121(b)(1)(A) (providing that marital property should be "valued as of a date as near as reasonably possible to the final divorce hearing date.").

The record reflects that, as of October 1, 2003 – two weeks prior to the parties' separation – the joint bank account had a balance of approximately \$54,700. The record further reflects that, on October 14, 2003, Husband wrote a check for \$25,130.05 on this account to purchase the 2004 Ford F-150 pickup truck which was awarded to him by the trial court. This left \$29,569.95 in the account. The bank records establish that Husband withdrew \$29,298.21 on October 15, 2003, *i.e.*, one day after the parties separated. The record is silent as to what happened to these remaining funds. Sometime prior to the divorce hearing, the joint account was closed. The exact date of the account's closing and the balance in the account at the time of closing is not reflected in the record.

In the end, the trial court found that each party was entitled to a return of their separate property contributed to the marital joint account. For Wife, this amount was \$17,757.29; for Husband, this amount was \$9,156. The court therefore deducted these two amounts from the \$54,700 that was in the account at the beginning of October 2003. When these adjustments are made, the balance in the joint account should have been approximately \$27,787. From this amount, the court deducted the \$25,130 for the price of the Ford truck that Husband purchased the day the parties separated. This adjustment left \$2,657 in the joint account. The court then found that Wife was entitled to one-half of this amount, *i.e.*, \$1,328.

We hold that the court's treatment of the parties' joint bank account is not unreasonable. On the contrary, it was more than reasonable for the court to adopt the approach chosen by it in

attempting to ascertain what is equitable in this case. The joint account was under the control of Husband following the parties' separation. After Husband purchased his new truck, the joint account had a balance of approximately \$29,569.95. Husband subsequently withdrew this money and used it for his individual needs and at his individual discretion. Given the fact that Wife contributed a substantial amount of money to the joint account, that Husband depleted the account's funds following the parties' separation, and that the account was no longer in existence at the time of the divorce hearing, we hold that the trial court was well within its discretion in addressing the value of the joint account around the time of the parties' separation and factoring in the use of those funds as a part of its reasoning in determining an equitable division. We find no abuse of discretion in the trial court's division of the parties' marital property.

VI.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of its judgment and for collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed against the appellant, Larry Lee Edgemon.

CHARLES D. SUSANO, JR., JUDGE